

Message Text

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FM SECSTATE WASHDC
TO AMEMBASSY LIMA

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E.O. 11652: N/A

TAGS: EINV, EIND, PE

SUBJECT: DRAFT PERUVIAN PATENT AND TRADEMARK LEGISLATION

REFS: A) LIMA A-073; B) LIMA 3498

1. THE CONVENTION AND PROTOCOL BETWEEN THE UNITED STATES
OF AMERICA AND OTHER AMERICAN REPUBLICS ON TRADE MARK AND
COMMERCIAL PROTECTION AND REGISTRATION OF TRADE MARKS
(46 STAT. 2907; TS 833) SIGNED IN 1929 IS STILL IN FORCE;
BOTH THE US AND PERU ARE PARTIES.

2. THE ENGLISH TEXT OF ARTICLE 1 READS AS FOLLOWS: "THE
CONTRACTING STATES BIND THEMSELVES TO GRANT TO THE NATION-
ALS OF THE OTHER CONTRACTING STATES AND TO DOMICILED
FOREIGNERS WHO OWN A MANUFACTURING OR COMMERCIAL ESTABLISH-
MENT OR AN AGRICULTURAL DEVELOPMENT IN ANY OF THE STATES
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WHICH HAVE RATIFIED OR ADHERED TO THE PRESENT CONVENTION
THE SAME RIGHTS AND REMEDIES WHICH THEIR LAWS EXTEND TO
THEIR OWN NATIONALS OR DOMICILED PERSONS WITH RESPECT TO
TRADE MARKS, TRADE NAMES, AND THE REPRESSION OF UNFAIR
COMPETITION AND FALSE INDICATIONS OF GEOGRAPHICAL ORIGIN
OR SOURCE."

3. THIS ARTICLE EMBODIES THE WELL KNOWN PRINCIPLE OF

"NATIONAL TREATMENT" WHICH REQUIRES THAT MEMBER STATES EXTEND TO NATIONALS OF OTHER MEMBER STATES LEGAL RIGHTS WHICH ARE AT LEAST EQUAL TO THE RIGHTS GIVEN TO THEIR OWN NATIONALS.

4. THIS PRINCIPLE WAS FIRST APPLIED IN MULTILATERAL INDUSTRIAL PROPERTY TREATIES IN THE 1883 PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY. AT THAT TIME THERE WAS A CONFUSING MASS OF RECIPROCAL BILATERAL AGREEMENTS, PRIMARILY AMONG EUROPEAN COUNTRIES, SETTING OUT DIFFERENT FEE STRUCTURES, PATENT AND TRADEMARK RIGHTS, ETC. THAT EXISTED BETWEEN EACH COUNTRY. IT WAS PRECISELY TO DO AWAY WITH THIS CONFUSING WELTER OF FEES, ETC. THAT THE PARIS CONVENTION WAS NEGOTIATED. UNDER THE CONVENTION A STATE MAY ESTABLISH WHATEVER NATIONAL FEE STRUCTURE IT DESIRES BUT IT MUST APPLY THOSE FEES EQUALLY TO THE NATIONALS OF ALL OTHER MEMBER STATES. TODAY SOME 85 COUNTRIES INCLUDING THE US BUT NOT PERU ARE MEMBERS OF PARIS TREATY.

5. THE 1929 INTER-AMERICAN CONVENTION WAS NEGOTIATED TO SET UP A HEMISPHERIC SYSTEM FOR THE PROTECTION OF TRADEMARKS AND PROVIDE FOR OTHER COMMERCIAL PROTECTION. THE OTHER MAJOR INTER-AMERICAN INDUSTRIAL PROPERTY TREATY, THE 1910 CONVENTION FOR THE PROTECTION OF INVENTIONS, PATENTS, DESIGNS AND INDUSTRIAL MODELS, ALSO CALLS FOR NATIONAL TREATMENT. PERU, HOWEVER, IS NOT A PARTY TO THIS TREATY.

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6. IN EXAMINING THE BACKGROUND AND EVOLUTION OF THE 1929 TREATY, THE USG BELIEVES IT TO BE CLEAR THAT THE NATIONAL TREATMENT PROVISION INCLUDED NATIONAL TREATMENT REGARDING FEES. THUS, THE DISCRIMINATORY FEE STRUCTURE FOR TRADEMARK REGISTRATIONS PROVIDED FOR IN THE DRAFT SUPREME DECREE TRANSMITTED REPAIR WOULD BE TOTALLY INCONSISTENT WITH PERU'S TREATY OBLIGATIONS.

7. DEPARTMENT COMMENDS EMBASSY'S ACTIONS TO DATE AND WOULD BE INTERESTED IN LEARNING LEGAL RATIONALE USED BY PATENT OFFICE (ITINTEC) ATTORNEYS IN ARGUING THAT DISCRIMINATORY FEES DO NOT VIOLATE TREATY.

8. ACTION REQUESTED: EMBASSY URGED TO CONTINUE TO ATTEMPT TO FORESTALL ADOPTION OF DRAFT SUPREME DECREE. ONE POSSIBLE FURTHER COURSE OF ACTION WOULD BE TO DISCUSS MATTER WITH EMBASSY OFFICIALS OF THE AFFECTED COUNTRIES. COLOMBIA, GUATEMALA, HAITI, HONDURAS, NICARAGUA, PANAMA AND PARAGUAY ARE ALL PARTY TO THE TREATY AND THEIR NATIONALS

WOULD SUFFER SAME ADVERSE CONSEQUENCES AS US NATIONALS.
OTHER COUNTRIES NOT PARTY TO THE TREATY BUT HAVING IMPORT-
ANT INVESTMENT OR TRADE TIES WITH PERU ARE ALSO LIKELY TO

OPPOSE THE DRAFT DECREE ON PRINCIPLE. IF THERE IS WIDE-
SPREAD CONCERN, EMBASSY MAY WANT TO CONSIDER POSSIBLE JOINT
APPROACH TO PERUVIAN AUTHORITIES TO OPPOSE DISCRIMINATORY
FEE SYSTEM. DEPARTMENT WOULD APPRECIATE REPORT ON FINAL
RESOLUTION OF THIS MATTER. CHRISTOPHER

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